

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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UNITED STATES OF AMERICA,

V.

PETER T. SANTILLI, JR.,

Plaintiff,

Case No. 2:16-cr-00046-PAL-GMN

## ORDER

(Mot. Sever – ECF No. 429, 456)

Defendant.

12 Before the court is Defendant Peter T. Santilli Jr.’s (“Santilli”) Motion to Sever Defendant  
13 Santilli from Being Tried with Co-Defendants and Leave to Supplement (ECF No. 429) and  
14 Amended Motion (ECF No 456). The court has considered the motion, the Government’s  
15 Response (ECF No. 515), the Government’s Motion to Supplement its Responses (ECF No. 971),  
16 and Santilli’s Response (ECF No. 1052).

## **BACKGROUND**

## I. The Indictment

19 Defendant Peter Santilli and 18 co-defendants are charged in a Superseding Indictment  
20 (ECF No. 27) returned March 2, 2016. Santilli is charged in all 16 counts with:

- Count One – Conspiracy to commit an offense against the United States in violation of 18 U.S.C. § 371. This charge arises from conduct that allegedly occurred sometime between March of 2014 and March 2, 2016.
- Count Two – Conspiracy to impede or injure a federal officer in violation of 18 U.S.C. § 372. This charge arises from conduct that allegedly occurred sometime between March of 2014 and March 2, 2016.
- Count Three – Use and carry of a firearm in relation to a crime of violence in violation of 18 U.S.C. § 924(c) and § 2. This charge arises from conduct that allegedly occurred sometime between March of 2014 and March 2, 2016.
- Count Four – Assault on a federal officer in violation of 18 U.S.C. § 111(a)(1), (b) and § 2. This charge arises from conduct that allegedly occurred on April 9, 2014.

- Count Five – Assault on a federal officer in violation of 18 U.S.C. § 111(a)(1), (b) and § 2. This charge arises from conduct that allegedly occurred on April 12, 2014.
- Count Six – Use and carry of a firearm in relation to a crime of violence in violation of 18 U.S.C. § 924(c) and § 2. This charge arises from conduct that allegedly occurred on April 12, 2014.
- Count Seven – Threatening a federal law enforcement officer, in violation of 18 U.S.C. § 115(a)(1)(B) and § 2. This charge arises from conduct that allegedly occurred on April 11, 2014.
- Count Eight – Threatening a federal law enforcement officer in violation of 18 U.S.C. § 115(a)(1)(B) and § 2. This charge arises from conduct that allegedly occurred on April 12, 2014.
- Count Nine – Use and carry of a firearm in relation to a crime of violence in violation of 18 U.S.C. § 924(c) and § 2. This charge arises from conduct that allegedly occurred on April 12, 2014.
- Count Ten – Obstruction of the due administration of justice in violation of 18 U.S.C. § 1503 and § 2. This charge arises from conduct that allegedly occurred on April 6, 2014.
- Count Eleven – Obstruction of the due administration of justice in violation of 18 U.S.C. § 1503 and § 2. This charge arises from conduct that allegedly occurred on April 9, 2014.
- Count Twelve – Obstruction of the due administration of justice in violation of 18 U.S.C. § 1503 and § 2. This charge arises from conduct that allegedly occurred on April 12, 2014.
- Count Thirteen – Interference with interstate commerce by extortion in violation of 18 U.S.C. § 1951 and § 2. This charge arises from conduct that allegedly occurred between April 2, 2014, and April 9, 2014.
- Count Fourteen – Interference with interstate commerce by extortion in violation of 18 U.S.C. § 1951 and § 2. This charge arises from conduct that allegedly occurred on April 12, 2014.
- Count Fifteen – Use and carry of a firearm in relation to a crime of violence in violation of 18 U.S.C. § 924(c) and § 2. This charge arises from conduct that allegedly occurred on April 12, 2014.
- Count Sixteen – Interstate travel in aid of extortion in violation of 18 U.S.C. § 1952 and § 2. This charge arises from conduct that allegedly occurred sometime between April 5, 2014 and April 12, 2016.

The Superseding Indictment (ECF No. 27) in this case arises out of a series of events related to a Bureau of Land Management (“BLM”) impoundment of Cliven Bundy’s cattle following a two-decade-long battle with the federal government. Beginning in 1993, Cliven Bundy continued to graze cattle on land commonly referred to as the “Bunkerville Allotment” without paying required grazing fees or obtaining required permits. The United States initiated civil litigation against Cliven Bundy in 1998 in the United States District Court for the District of

1 Nevada. The court found that Cliven Bundy had engaged in unauthorized and unlawful grazing  
 2 of his livestock on property owned by the United States and administered by the Department of  
 3 the Interior through the BLM. The court permanently enjoined Cliven Bundy from grazing his  
 4 livestock on the Allotment, ordered him to remove them, and authorized the BLM to impound any  
 5 unauthorized cattle. Bundy did not remove his cattle or comply with the court's order and  
 6 injunction. The United States went back to court. Subsequent orders were entered in 1999 and  
 7 2013 by different judges in this district permanently enjoining Bundy from trespassing on the  
 8 Allotment and land administered by the Nevada Park Service ("NPS") in the Lake Mead National  
 9 Recreation Area<sup>1</sup>, ordering Bundy to remove his cattle, and explicitly authorizing the United States  
 10 to seize, remove, and impound any of Bundy's cattle for future trespasses, provided that written  
 11 notice was given to Bundy.

12 On February 17, 2014, the BLM entered into a contract with a civilian contractor in Utah  
 13 to round up and gather Bundy's trespass cattle. BLM developed an impoundment plan to establish  
 14 a base of operations on public lands near Bunkerville, Nevada, about 7 miles from the Bundy ranch  
 15 in an area commonly referred to as the Toquop Wash. On March 20, 2014, BLM also entered into  
 16 a contract with an auctioneer in Utah who was to sell impounded cattle at a public sale. Bundy  
 17 was formally notified that impoundment operations would take place on March 14, 2014. The  
 18 following day, Bundy allegedly threatened to interfere with the impoundment operation by stating  
 19 publicly that he was "ready to do battle" with the BLM, and would "do whatever it takes" to protect  
 20 "his property." The superseding indictment alleges that after being notified that BLM intended to  
 21 impound his cattle, Bundy began to threaten to interfere with the impoundment operation, and  
 22 made public statements he intended to organize people to come to Nevada in a "range war" with  
 23 BLM and would do whatever it took to protect his cattle and property.

24 The superseding indictment alleges that, beginning in March 2014, the 19 defendants  
 25 charged in this case planned, organized, conspired, led and/or participated as followers and  
 26 gunmen in a massive armed assault against federal law enforcement officers to threaten, intimidate,

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 28 <sup>1</sup> By 2012, Bundy's cattle had multiplied and he also began grazing his cattle on land administered by the  
 NPS in the Lake Mead National Recreation Area without obtaining grazing permits or paying grazing fees.

1 and extort the officers into abandoning approximately 400 head of cattle owned by Cliven Bundy.  
2 The removal and impoundment operation began on April 5, 2014. On April 12, 2014, defendants  
3 and hundreds of recruited “followers” executed a plan to recover the cattle by force, threats, and  
4 intimidation. Defendants and their followers demanded that officers leave and abandon the cattle  
5 and threatened to use force if the officers did not do so. The superseding indictment alleges armed  
6 gunmen took sniper positions behind concrete barriers and aimed their assault rifles at the officers.  
7 Defendants and their followers outnumbered the officers by more than 4 to 1, and the potential  
8 firefight posed a threat to the lives of the officers, as well as unarmed bystanders which included  
9 children. Thus, the officers were forced to leave and abandon the impounded cattle.

10 After the April 12, 2014 confrontation with federal officers, the superseding indictment  
11 alleges that the leaders and organizers of the conspiracy organized armed security patrols and  
12 check points in and around Cliven Bundy’s Bunkerville ranch to deter and prevent any future law  
13 enforcement actions against Bundy or his co-conspirators, and to protect Bundy’s cattle from  
14 future law enforcement actions.

15 **II. Procedural History**

16 An Indictment (ECF No. 5) was returned February 17, 2016, charging Santilli and co-  
17 defendants Ryan Bundy, Ammon Bundy, Ryan Payne, and Cliven Bundy with 16 felony counts.  
18 Santilli was arrested March 30, 2016, on a Superseding Indictment (ECF No. 27) returned March  
19 2, 2016, and a warrant issued in this district. All 19 defendants made their appearances in this case  
20 in this district between March 4, 2016, and April 15, 2016. At the initial appearance of each  
21 defendant, the government stated its position that this was a complex case that would require  
22 special scheduling review. All 19 defendants are currently joined for trial pursuant to the  
23 provisions of the Speedy Trial Act. All 19 defendants have been detained pending trial.

24 In an Order (ECF No. 198) entered March 25, 2016, the court directed the parties to meet  
25 and confer as required by LCR 16-1 to discuss whether this case should be designated as complex,  
26 and, if so, to attempt to arrive at an agreed-upon complex scheduling order addressing five  
27 specified topics for discussion. The order gave the parties until April 18, 2016, to file a stipulated  
28 proposed complex case schedule if all parties were able to agree, or if they were not, to file a

1 proposed schedule with supporting points and authorities stating each party's position with respect  
2 to whether or not the case should be designated as complex, a proposed schedule for discovery,  
3 pretrial motions, and trial, and any exclusions of time deemed appropriate under 18 U.S.C. § 3161.

4 A Proposed Complex Case Schedule (ECF No. 270) was filed on April 18, 2016. In it, the  
5 government and 13 of the 19 defendants agreed that the case should be designated as complex.  
6 The 13 defendants who stipulated to the proposed schedule included: Cliven Bundy, Mel Bundy,  
7 Dave Bundy, Blaine Cooper, Gerald Delemus, O. Scott Drexler, Richard Lovelien, Steven Stewart,  
8 Todd Engel, Gregory Burleson, Joseph O'Shaughnessy, Micah McGuire and Jason Woods. Three  
9 defendants, Ammon Bundy, Peter Santilli, and Brian Cavalier, indicated that they would "defer  
10 the decision to agree or disagree, pending further consultation with counsel and/or have taken no  
11 position as to the filing of this pleading." Three defendants, Ryan Bundy, Eric Parker, and Ryan  
12 Payne, disagreed that the case should be designated as a complex case "to the extent time is  
13 excluded under the STA."

14 The same 13 defendants who initially stipulated that the case should be designated as  
15 complex, agreed that the May 2, 2016 trial date should be vacated, and that the trial in this matter  
16 should be set on the first available trial track beginning "in or around February 2017." Three  
17 defendants, Ammon Bundy, Peter Santilli, and Brian Cavalier, "deferred the decision to agree or  
18 disagree about a trial date pending further consultation with counsel, or have not taken a position."

19 The 13 defendants who stipulated the case should be designated as complex and a trial date  
20 set in February 2017, stipulated "that all time from the entry of Defendants' pleas in this case until  
21 the trial of this matter is excluded for purposes of the STA pursuant to 18 U.S.C. § 3161(h)(7)(A)  
22 as the ends of justice outweigh the interest of the public and the defendants in a speedy trial."  
23 Ammon Bundy, Peter Santilli and Brian Cavalier "deferred the decision to agree or disagree about  
24 the exclusion of time, pending further consultation with counsel, or have taken no position on the  
25 matter." Ryan Bundy stated he disagreed "to the extent any exclusion of time denies him the right  
26 to a speedy trial under the STA." Eric Parker stated he disagreed "with no further position stated."  
27 Ryan Payne stated he disagreed "with the exclusion of time to the extent it denies him the right to  
28 a speedy trial under the STA."

1       The court held a scheduling and case management conference on April 22, 2016, to  
 2 determine whether this case should be designated as complex. Eighteen of the nineteen defendants  
 3 appeared with their counsel. Defendant Ryan Bundy appeared pro se with standby counsel, Angela  
 4 Dows. At the scheduling and case management conference on April 22, 2016, many of the  
 5 defendants who had initially stipulated to the complex case schedule and a February 2017 trial  
 6 date, changed positions. The positions of each of the defendants were stated on the record at the  
 7 hearing and memorialized in the court's Case Management Order (ECF No. 321) entered April 26,  
 8 2016. The court found the case was a complex case within the meaning of 18 U.S.C. §  
 9 3161(h)(7)(B)(ii), and set the trial for February 6, 2017. The case management order made  
 10 findings concerning why this case was deemed complex within the meaning of 18 U.S.C. §  
 11 3161(h)(7)(B), and the court's findings on exclusion of time for purposes of the Speedy Trial Act.  
 12 The case management order also set deadlines for filing motions to sever, motions for filing pretrial  
 13 motions and notices required by Rule 12 of the Federal Rules of Criminal Procedure<sup>2</sup>, and LR  
 14 12(1)(b). No defendant filed objections to the determination that this case was complex, the court's  
 15 Speedy Trial Act tolling and exclusion findings, or any other provision of the court's case  
 16 management order.

17       **III. The Parties' Positions**

18       **A. The Motion to Sever**

19       Santilli's motion seeks a severance from the trial of all his other co-defendants. The motion  
 20 argues that Santilli shot a video on April 9, 2014, that "went viral" and was the catalyst for  
 21 hundreds of protestors arriving in Bunkerville, Nevada at the Bundy ranch. Santilli argues he was  
 22 merely covering the events that were taking place at the Bundy ranch as a new breed of journalist,  
 23 and that he has a "wholly different defense" than that of his co-defendants because he was merely  
 24 recording events while at the Bundy ranch. Santilli claims that his broadcasts and advocacy toward  
 25 the plight of ranchers in the western United States are protected speech under the First Amendment.  
 26 His amended motion argues that his protected speech is being used against him as evidence in this  
 27 case. The amended motion also argues that Cliven Bundy's attorney, Joel Hansen, has caused a

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28 <sup>2</sup> All references to a "Rule" or the "Rules" refer to the Federal Rules of Criminal Procedure.

1 rift that has spilled over to him. Specifically, Cliven Bundy's former counsel, Joel Hansen, has  
2 attacked the trial judge and her husband along with the President of the United States in motion  
3 practice and in a separately filed lawsuit. Although Santilli continues to support all of Bundy's  
4 constitutional arguments regarding the protest involved in this superseding indictment, he takes  
5 issue with Mr. Hansen's recent conduct in defending this criminal case.

6 Santilli argues that he should be severed from the trial of his co-defendants and tried  
7 separately because he will be denied access to co-defendant exculpatory testimony in a joint trial.  
8 He also claims that he may be found guilty by association if tried with his co-defendants because  
9 it is extraordinarily difficult for a jury to follow admonishing instructions and keep evidence  
10 relevant only to his co-defendants separate. Santilli requests leave to supplement his motion to  
11 sever after he has had an adequate opportunity to review the discovery and statements of all of the  
12 defendants.

13 **B. The Government's Response**

14 The government opposes the motion arguing the crimes charged in the superseding  
15 indictment involve a continuing conspiracy to impede and interfere with federal law enforcement  
16 officers. This conspiracy began in at least March 2014, and continued through March 2016, when  
17 the superseding indictment was returned. The superseding indictment alleges that during the  
18 course of the conspiracy, defendant Cliven Bundy led a criminal enterprise to prevent federal law  
19 enforcement officers from taking actions to enforce federal court orders that required the removal  
20 of his cattle that had been grazing on public lands unlawfully for more than 20 years. This  
21 enterprise was conducted through threats of force and violence, actual force and violence, assault,  
22 and extortion.

23 The superseding indictment alleges that Cliven Bundy began recruiting the members of the  
24 conspiracy in March 2014, using social medial to call for gunmen and others to come to  
25 Bunkerville, Nevada, the site of the impoundment, to physically confront, impede and interfere  
26 with law enforcement officers as they were executing their duties to enforce federal court orders.  
27 Ultimately, over 400 of Bundy's followers converged on the site where the officers were  
28 impounding cattle on April 12, 2014. The government claims that over 60 of Bundy's followers

1 were either carrying, using, or brandishing firearms, including assault rifles, as they converged on  
2 the gate and blocked the entrance to the impoundment site which was guarded by approximately  
3 40 law enforcement officers. The government also maintains that the conspiracy continued after  
4 April 12, 2014, because conspirators took concerted action to protect Bundy's cattle from future  
5 impoundment and to prevent law enforcement actions against Cliven Bundy.

6 Cliven Bundy, along with his sons Ammon Bundy and Ryan Bundy, and co-Defendants  
7 Peter Santilli and Ryan Payne, are charged in all 16 counts of the indictment. Cliven Bundy, Ryan,  
8 Ammon, Mel, and Dave Bundy are alleged to be leaders and organizers of the conspiracy along  
9 with co-Defendants Ryan Payne and Peter Santilli. Defendants Blaine Cooper, Brian Cavalier,  
10 Joseph O'Shaughnessy and Gerald Delemus are alleged to be mid-level leaders and organizers of  
11 the conspiracy. The remaining defendants, Eric Parker, O. Scott Drexler, Steven Stewart, Richard  
12 Lovelien, Todd Engel, Gregory Burleson, Micah McGuire and Jason Woods were gunmen.

13 The superseding indictment alleges that Cliven Bundy was the leader, organizer, and chief  
14 beneficiary of the conspiracy who possessed ultimate authority over the scope, manner and means  
15 of conspiratorial operations. He also received the economic benefits of the extortion plead in the  
16 indictment.

17 The government points out that it made its initial disclosures to the defendants on May 6,  
18 2016, pursuant to the court's Case Management Order (ECF No. 321). The initial disclosures  
19 included the Rule 16 statements of the defendants and other Rule 16 information and materials.  
20 The government is withholding disclosure of Jencks materials until 30 days before trial because of  
21 serious concerns for witness safety and security.

22 The government maintains that all of the defendants were appropriately joined for trial  
23 pursuant to Fed. R. Crim. P. 8(b) and 14(a). These rules are designed to avoid multiple trials and  
24 promote judicial economy and efficiency. Defendants charged together and properly joined under  
25 Rule 8(b) are generally tried together. Joinder is "particularly appropriate" in a conspiracy case  
26 where all of the co-defendants are members of a conspiracy. The concern for judicial efficiency  
27 is less likely to be outweighed by possible prejudice to the defendants in a joint trial of a conspiracy  
28 case because much of the evidence would be admissible against each defendant in separate trials.

1 Joint trials provide the jury with an ability to see the entire picture of the alleged crime, and enable  
2 the jury to reach a more reliable conclusion as to the guilt or innocence of the defendants involved.  
3 Joint trials also limit the burden of requiring witnesses or victims to testify on multiple occasions  
4 in separate trials and avoid “randomly favoring the last-tried defendants who have the advantage  
5 of knowing the prosecution’s case beforehand.”

6 The government cites United States Supreme Court and Ninth Circuit authority holding  
7 that a party seeking severance must show unusual circumstances in which a joint trial would be  
8 “manifestly prejudicial” to warrant severance. This is a high standard which can be met if a  
9 defendant demonstrates that his specific trial rights are compromised, or where a jury would be  
10 unable to reach a reliable verdict without severance. It requires a showing that a joint trial would  
11 be so prejudicial that it would deprive the defendant of a fair trial. A showing that jointly charged  
12 defendants have varying degrees of culpability or that there is an improved possibility of acquittal  
13 in a separate trial is insufficient to warrant severance.

14 In this case, the government argues, Santilli has failed to demonstrate any prejudice, let  
15 alone manifest prejudice would result from a joint trial. The government characterizes this as a  
16 “paradigm case for joinder.” Santilli is charged as a leader and organizer of a conspiracy where  
17 18 of 19 defendants charged were present in the same place and at the same time, for the same  
18 purpose which was to assault and extort law enforcement officers and obtain Bundy’s impounded  
19 cattle.

20 The government points out that Santilli is charged with each count of the superseding  
21 indictment along with co-defendants Cliven Bundy, Ryan Bundy, Ammon Bundy, and Ryan  
22 Payne. The superseding indictment alleges that Santilli was one of the leaders and organizers of  
23 the conspiracy who committed numerous overt acts to further the conspiracy. Specifically, Santilli  
24 used the internet to recruit gunmen and other followers to come to the Bundy ranch to confront  
25 law enforcement officers, led an assault on a BLM convoy on April 9, 2014, which threatened law  
26 enforcement officers, and participated in the “assault and extortion” on April 12, 2014. Santilli  
27 began recruiting gunmen on April 8, 2014, and continued using various blog sites to issue calls to  
28 arms for gunmen to travel to Nevada and stop the impoundment. Nothing prevents Santilli from

1 advancing his defense that he is a new breed of journalist protected by the First Amendment.  
 2 Additionally, Santilli's bald claims that he was not a leader and organizer of the conspiracy is not  
 3 a justification for granting severance. If this was the standard there would never be joint trials  
 4 because every defendant who pleaded not guilty would be severed. Finally, Santilli has not  
 5 established that conduct by counsel for Cliven Bundy, which has not occurred before a jury, will  
 6 prejudice him.

7 **C. The Government's Motion to Supplement Response**

8 The Government's Motion to "Supplement" (ECF No. 971) acknowledges that the  
 9 government filed oppositions to each of the defendants' severance motions, arguing that the nature  
 10 of the allegations and charges made this case appropriate for joinder and that defendants had not  
 11 shown a joint trial would manifestly prejudice them. *Id.* at 6. The governments' responses  
 12 objected to individual trials, and did not propose an alternative to a single 19-defendant trial.<sup>3</sup> *Id.*  
 13 The government states it took this position because, when it filed its oppositions to the motions to  
 14 sever, it was unclear whether all of the defendants would be available for the February 2017 trial  
 15 as a number of defendants were also charged in the District of Oregon and awaiting trial. The  
 16 charges against the defendants who were also charged in the District of Oregon have now been  
 17 resolved, and all of the remaining 17 defendants will be available for the trial set in February 2017.  
 18 The government has concluded that there is little likelihood that any more defendants will resolve  
 19 their case short of trial. The government therefore seeks leave to submit a supplemental response  
 20 to defendants' severance motions and its own request and proposal for severance.

21 The government now argues the court should exercise its inherent authority to manage its  
 22 docket and order severance because a joint trial of all 17 remaining defendants would unreasonably  
 23 increase the amount of time it takes to try all defendants, result in greater delay, confusion and  
 24 difficulty in maintaining an orderly and efficient proceeding. It seeks to align defendants into  
 25 proposed groupings of three-tiers for three separate trials:

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<sup>3</sup> Two of the 19 defendants, Gerald A. DeLemus and Blaine Cooper, have now resolved their cases by entering guilty pleas.

- **Tier 1 – Leaders and Organizers:** Defendants Cliven Bundy, Ryan Bundy, Ammon Bundy, Peter Santilli, and Ryan Payne.
- **Tier 2 – Mid-level Leaders and Organizers and Follower-Gunmen:** Defendants Dave Bundy, Mel Bundy, Joseph O’Shaughnessy, Brian Cavalier, Jason Woods and Micah McGuire.
- **Tier 3 – Follower-Gunmen:** Defendants Ricky Lovelien, Todd Engel, Gregory Burleson, Eric Parker, O. Scott Drexler, and Steven Stewart.

8 Citing *United States v. Taylor-Prigge*, 830 F.3d 1094, 1098 (9th Cir. 2016) and *United*  
9 *States v. Mancuso*, 130 F.R.D. 128, 130 (D. Nev. 1990), the United States argues that severance is  
10 justified where a joint trial would cause manifest prejudice, or irrespective of prejudice, interfere  
11 with the court’s inherent authority to manage its docket, or both. The government continues to  
12 maintain that there would be “no material prejudice attached to the joinder of the defendants here  
13 because the charged offenses all arise from a common nucleus of operative fact, and because there  
14 is no serious risk of prejudicial ‘spillover’ of otherwise admissible evidence.” However, the  
15 government now seeks severance under the second *Mancuso* factor to allow the district court to  
16 control its docket. The government argues that a single 17-defendant jury trial, which none of the  
17 defendants initially requested, would unreasonably increase the time it takes to try all of the  
18 defendants, result in a greater risk of delay, confusion, and difficulty in maintaining an orderly and  
19 efficient proceeding. The government estimates that a 17-defendant trial would, under the best  
20 circumstances, likely take between 4 and 6 months to complete, and require the government to call  
21 between 60 and 75 witnesses. Cross-examination of each of these witnesses by 17 separate defense  
22 counsel would unreasonably extend the length of the trial. Additionally, a joint trial would likely  
23 result in delays based on scheduling difficulties and conflicts attendant to so large a number of  
24 defendants and their counsel. Under these circumstances, the court may exercise its inherent  
25 powers to fashion efficient, smaller trials from an otherwise unwieldly, mass, joint trial.

26 The government continues to maintain that 17 separate trials would also unreasonably  
27 increase the total time required to try all defendants. The government estimates that individual  
28 trials would take a minimum of 3 to 4 weeks each, requiring the government to call from 30 to 45

1       witnesses to present its case-in-chief for each of the 17 trials, and potentially 17 months to  
2       complete all 17 trials. More importantly to the government, separate trials will unreasonably  
3       subject victims to being “re-victimized time and again as they are forced to retell the violence and  
4       threats of death and bodily injury they faced on April 12, 2014.” The government therefore  
5       submits its 3-tier severance plan is an attempt to strike a reasonable balance between these two  
6       otherwise unreasonable alternatives.

7           The government argues that its 3-tier proposal groups the defendants in a way that  
8       “conforms conceptually to their roles in the conspiracy and aligns with the evidence the  
9       government anticipates offering at trial.” The defendants in Tier 1 are the leaders and organizers  
10      who were involved in most, or all of the critical events leading to the April 12, 2014 assault. This  
11      includes the March 28, 2014 blocking of the BLM convoy; the April 2, 2014 threats and  
12      interference with the Utah auction barn; the April 8, 9, and 10, 2014 calls to arms; the April 9,  
13      2014 “ambush” of the BLM convoy; the April 9, 2014 threats and interference with the Utah  
14      auction barn, the April 11, 2014 threat against the impoundment special agent in charge; and the  
15      April 12, 2014 assault.

16           The same is not true of the Tier 3 defendants who are identified as follower-gunned, whose  
17      involvement in the conspiracy is restricted more to their actions during the assault on April 12,  
18      2014. Similarly, the Tier 2 defendants are identified as mid-level leaders and organizers whose  
19      leadership roles involve their “actions on the ground during the April 12, 2014 assault, and less by  
20      their pre-assault activities.”

21           The government expects that at a trial of the Tier 1 defendants, it would offer more  
22      evidence of the details of the broader conspiracy and the defendants’ leadership roles in the  
23      conspiracy. While evidence of the broader conspiracy is equally admissible against Tier 2 and 3  
24      defendants, in separate trials, the government would offer this evidence in summary, rather than  
25      in detailed form, simply to provide context for the events of April 12, 2014.

26           The government indicates it is likely to offer more evidence regarding the details of  
27      individual movements of Tier 2 and 3 defendants through the wash and over the bridges during  
28      the assault to demonstrate their concert of action and intent. By contrast, a trial of the Tier 1

1 defendants would focus less on the individual movements of the gunmen and on-the-ground  
 2 leaders, and more on the mass movements of the followers against the BLM position. These  
 3 examples point out the efficiencies that would be gained through a tiered trial presentation of the  
 4 proposed groupings.

5 The government proposes that the cases be tried *seriatim*, *i.e.*, three trials with intervals of  
 6 4 to 6 weeks between each trial. The government has proposed the tiers because the Tier 1  
 7 defendants have the most involvement in the broader conspiracy and therefore, greater culpability  
 8 and responsibility for the actions charged on April 12, 2014. To invert the order would produce  
 9 “the anomalous and less fair result of trying less culpable actors before the more culpable ones.”

10 The government anticipates that some of the defendants who are not in Tier 2 or 3 may  
 11 demand that they be tried following other defendants suddenly complaining that they are not ready  
 12 for trial in February 2017. If these arguments are made, the government will respond, but argues  
 13 that the defendant should not be allowed to “game the order of the proposed trials using the speedy  
 14 trial act”, or through seeking a continuance to accommodate late-in-the-game trial preparation.  
 15 With respect to the defendants’ anticipated speedy trial arguments, the government cites U.S.C. §  
 16 3161(h)(7)(B)(ii) which gives the court authority to exclude time on its own motion where the case  
 17 is “so unusual or complex due to the number of defendants.”

18 **D. Santilli’s Response**

19 Santilli’s response largely reiterates arguments made in his initial motion to sever. He asks  
 20 that “first and foremost that he be tried for his speech in a separate trial away from all of the other  
 21 defendants in this case.” Alternatively, he requests “that the Court accommodation allow any or  
 22 all of the defendants to be tried together.” The response reiterates that he should be severed from  
 23 the trial of all of his co-defendants for two reasons. First, because he will be denied access to the  
 24 exculpatory testimony of his co-defendants. Second, because the jury is likely to find him guilty  
 25 by association if he is tried with all of the defendants. He asks leave to submit an affidavit from a  
 26 co-defendant at a later date which satisfies the requirements of *United States v. Vigil*, 561 F.2d  
 27 1316 (9th Cir. 1997). The crux of the government’s case against Santilli is that he recruited people  
 28 to come to the Bundy ranch. Santilli will be calling witnesses and co-defendants to testify that his

1 broadcasts were of no relevance to their decision to demonstrate on the Bundy ranch. He will be  
 2 presenting almost exclusively First Amendment defenses to the indictment, specifically that his  
 3 actions were not “imminent” as defined by case law.

4 In a purely strategic move by the government, trial groupings have been proposed that will  
 5 limit his ability to obtain a fair trial. The proposed grouping of Cliven, Ryan, and Ammon Bundy  
 6 with him will severely prejudice his ability to defend himself through the testimony of other  
 7 defendants. He expects the government will “make much ado about the defendants with firearms  
 8 on the overpass.” “The removal of these defendants and the benefit of their defense to their actions  
 9 severely prejudice Santilli.” Thus, the court should sever Santilli from all other defendants in this  
 10 case, or allow all of the defendants to be tried together.

11 At the December 9, 2016 hearing counsel for Santilli stated that if the court was going to  
 12 sever the case Santilli wanted to go to trial in the first group. He suggested 2 trials, the first of  
 13 which should be the first 8 defendants named in the superseding indictment.

14 **DISCUSSION**

15 **I. Applicable Law**

16 **A. Rule 8(a): Joinder**

17 Rule 8 permits joinder of offenses or defendants in the same criminal indictment. Rule  
 18 8(a) allows for joinder of multiple offenses against a single defendant if the offenses are: (i) of the  
 19 same or similar character; (ii) based on the same act or transaction; or (iii) connected with or  
 20 constituting parts of a common scheme or plan. Fed. R. Crim. P. 8(a); *see also United States v.*  
 21 *Prigge*, 830 F.3d 1094, 1098 (9th Cir. 2016). Rule 8 has been broadly construed in favor of joinder.  
 22 *See, e.g., United States v. Lane*, 474 U.S. 438, 449 (1986); *United States v. Jawara*, 474 F.3d 565,  
 23 572 (9th Cir. 2006). The public has a substantial interest in joint trials because they conserve  
 24 government funds, minimize inconvenience to witnesses and public authorities, and avoid delays  
 25 in bringing a defendant to trial. *United States v. Washington*, 887 F. Supp. 2d 1077, 1107 (D.  
 26 Mont. 2012) (quoting *United States v. Camacho*, 528 F.2d 464, 470 (9th Cir. 1976)). Misjoinder  
 27 of charges under Rule 8(a) is a question of law reviewed de novo. *Jawara*, 474 F.3d at 572 (citing  
 28 *United States v. Terry*, 911 F.2d 272, 276 (9th Cir. 1990)).

1           Generally, a valid basis for joinder must be discernible from the face of the indictment.  
 2           *Jawara*, 474 F.3d at 572–73 (citing *United States v. VonWillie*, 59 F.3d 922, 929 (9th Cir. 1995);  
 3           *Terry*, 911 F.2d at 276). Mere factual similarity between the events is not a sufficient basis for  
 4           joinder. *United States v. Vasquez-Velasco*, 15 F.3d 833, 843 (9th Cir. 1994) (interpreting Rule  
 5           8(b) governing joinder of two or more defendants in the same indictment). However, the term  
 6           “transaction” is interpreted flexibly, and determining whether a “series” exists depends on whether  
 7           there is a “logical relationship” between the transactions. *Id.* “A logical relationship is typically  
 8           shown by the existence of a common plan, scheme, or conspiracy.” *Id.* at 844 (internal citations  
 9           omitted). A logical relationship may also be shown if the common activity constitutes a substantial  
 10           portion of the proof of the joined charges. *Id.*

11           **B.       Rule 14: Severance**

12           Rule 14 governs the severance of both defendants and charges. *Id.* at 845. Even where  
 13           joinder is proper under Rule 8(a), the court may order separate trials of counts or provide other  
 14           relief that justice requires if joinder “appears to prejudice a defendant or the government.” Fed.  
 15           R. Crim. P. 14(a). The court’s power to order severance “rests within the broad discretion of the  
 16           District Court as an aspect of its inherent right and duty to manage its own calendar.” *United*  
 17           *States v. Gay*, 567 F.2d 916, 919 (9th Cir. 1978). The court’s denial of a motion to sever is  
 18           reviewed for abuse of discretion. *Prigge*, 830 F.3d at 1098.

19           The defendant seeking severance bears the burden of showing undue prejudice of such a  
 20           magnitude that, without severance, he will be denied a fair trial. *See United States v. Jenkins*, 633  
 21           F.3d 788, 807 (9th Cir. 2011). Prejudice may arise where: (a) the jury could confuse and cumulate  
 22           the evidence of one charge to another; (b) the defendant could be confounded in presenting his  
 23           defenses (*i.e.*, where a defendant wishes to testify in his own defense on one count but not another);  
 24           and (c) the jury could erroneously conclude the defendant is guilty on one charge and therefore  
 25           convict him on another based on his criminal disposition. *United States v. Johnson*, 820 F.2d 1065,  
 26           1070 (9th Cir. 1987). However, if there is a risk of prejudice, the trial court can neutralize the risk  
 27           with appropriate jury instructions, and “juries are presumed to follow their instructions.” *See, e.g.*,  
 28           *Zafiro v. United States*, 506 U.S. 534, 540 (1993); *Vasquez-Velasco*, 15 F.3d at 847 (collecting

1 cases regarding jury instructions concerning compartmentalizing evidence and spillover  
 2 prejudice); *United States v. Patterson*, 819 F.2d 1495, 1503 (9th Cir.1987) (severance is  
 3 unnecessary when the trial court carefully instructs the jury “because the prejudicial effects of the  
 4 evidence of co-defendants are neutralized”).

5 Rule 14 does not require severance even if prejudice is shown; rather, the rule leaves the  
 6 tailoring of the relief to be granted, if any, to the district court’s sound discretion. *Zafiro*, 506 U.S.  
 7 at 538–39. The Ninth Circuit has explained that Rule 14 sets a high standard for showing prejudice  
 8 “because some prejudice is inherent in any joinder of defendants, if only ‘some’ prejudice is all  
 9 that need be shown, few, if any, multiple defendant trials could be held.” *United States v. Vaccaro*,  
 10 816 F.2d 443, 448 (9th Cir. 1987), *abrogated on other grounds by Huddleston v. United States*,  
 11 485 U.S. 681 (1988). The test for determining abuse of discretion in denying severance under  
 12 Rule 14 is “whether a joint trial was so manifestly prejudicial as to require the trial judge to exercise  
 13 his discretion in but one way, by ordering a separate trial.” *Jenkins*, 633 F.3d at 807 (citing *United*  
 14 *States v. Decoud*, 456 F.3d 996, 1008 (9th Cir. 2006)).

15 Notably, the Ninth Circuit had acknowledged that a joint trial is “particularly appropriate”  
 16 when defendants are charged with conspiracy. *Id.* (citing *Zafiro*, 506 U.S. at 536–37). This is so  
 17 “because the concern for judicial efficiency is less likely to be outweighed by possible prejudice  
 18 to the defendants when much of the evidence would be admissible against each of them in separate  
 19 trials.” *United States v. Boyd*, 78 F. Supp. 3d 1207, 1212 (N.D. Cal. 2015) (quoting *United States*  
 20 *v. Fernandez*, 388 F.3d 1199, 1242 (9th Cir. 2004)).

21 **C. The *Bruton* Rule**

22 In *Bruton v. United States*, 391 U.S. 123 (1968), the Supreme Court held that a defendant’s  
 23 Sixth Amendment right to confront and cross-examine witnesses is violated when a facially  
 24 incriminating confession of a non-testifying co-Defendant is introduced at a joint trial, even if the  
 25 jury is instructed to consider the confession only against the co-defendant. To violate the  
 26 Confrontation Clause, the co-defendant’s confession must directly incriminate the objecting  
 27 defendant. *Id.* at 126. However, the Supreme Court later held that “the Confrontation Clause is  
 28 not violated by the admission of a non-testifying co-defendant’s confession with a proper limiting

1 instruction when . . . the confession is redacted to eliminate not only the defendant's name, but any  
 2 reference to his or her existence." *Richardson v. Marsh*, 481 U.S. 200, 211 (1987). In *Richardson*,  
 3 the Supreme Court declined to extend the *Bruton* doctrine to "confessions incriminating by  
 4 connection.'" *Id.* at 209.

5 A properly redacted confession of a co-defendant does not violate the Confrontation Clause  
 6 if the confession does not refer to the defendant. *Mason v. Yarborough*, 447 F.3d 693, 695–96  
 7 (9th Cir. 2006). However, the redacted confession may not reference the co-defendant by  
 8 implication, for example, by replacing a name with an obvious blank space or symbol or word  
 9 such as "deleted." *Gray v. Maryland*, 523 U.S. 185, 196–97 (1998).

10 In *United States v. Parks*, 285 F.3d 1133 (9th Cir. 2002), the Ninth Circuit held that the  
 11 trial court erred in admitting an improperly redacted confession which included the term "they" in  
 12 various places from which the jury could infer the existence of a third accomplice. Parks and co-  
 13 defendant Williams were tried and convicted of bank robbery committed by three individuals. Co-  
 14 defendant Williams gave a statement to the FBI which was admitted in redacted form at trial.  
 15 Williams confessed to the robbery and stated Parks was the individual who collected the money  
 16 inside the bank. Although all portions of the statement in which Williams made any reference to  
 17 Parks or the two of them acting together were redacted, two sentences contained the word "they,"  
 18 indicating at least two other individuals were involved other than Williams. The Ninth Circuit  
 19 found that the jury would naturally conclude that Parks was the name redacted from the confession.  
 20 "The combination of an obviously redacted statement with the language implying the existence of  
 21 a third person reasonably could leave the jury to conclude that the unnamed third person must be  
 22 the co-defendant before them." *Id.* at 1139. The court held that admission of Williams' redacted  
 23 statement was error. However, after an exhaustive review of the record it determined that the error  
 24 was harmless beyond a reasonable doubt because there was substantial evidence of Parks' guilt.  
 25 *Id.* at 1139–40.

26 **D. Antagonistic Defenses**

27 Antagonistic defenses, "or the desire of one defendant to exculpate himself by inculpating  
 28 a co-defendant," is not sufficient to require severance. *United States v. Throckmorton*, 87 F.3d

1 1069, 1072 (9th Cir. 1996) (citing *United States v. Sherlock*, 962 F.2d 1349, 1363 (9th Cir. 1992)).  
 2 A defendant will only be entitled to severance based on mutually antagonistic defenses if “the core  
 3 of the co-defendant’s defense is so irreconcilable with the core of his own defense that the  
 4 acceptance of the co-defendant’s theory by the jury precludes acquittal of the defendant.” *United*  
 5 *States v. Cruz*, 127 F.3d 791, 799 (9th Cir. 1997) (quoting *Throckmorton*, 87 F.3d at 1072); *see*  
 6 *also United States v. Tootick*, 952 F.2d 1078, 1081 (9th Cir. 1991) (mutually exclusive defenses  
 7 said to exist when acquittal of one co-defendant would necessarily call for the conviction of the  
 8 other); *United States v. Hernandez*, 952 F.2d 1110, 1116 (9th Cir. 1991) (to obtain severance on  
 9 basis of antagonistic defenses, defendant must show that acceptance of one party’s defense will  
 10 preclude acquittal of the other party). The district court may also “reduce any potential confusion  
 11 between the defendants by instructing the jury that it should evaluate the evidence against each  
 12 defendant separately and that the verdict as to one defendant should not control the verdicts of the  
 13 others.” *Id.* at 800 (citing *Zafiro*, 506 U.S. at 540–41).

14 **E. Severance for Favorable Testimony from Co-Defendants**

15 A defendant who moves for severance to obtain favorable testimony from a co-defendant  
 16 must show the following: (1) he would call the co-defendant at the severed trial; (2) that the co-  
 17 defendant would in fact testify; and (3) that the testimony would be favorable to him. *United*  
 18 *States v. Jenkins*, 785 F.2d 1387, 1393–94 (9th Cir. 1986) (citing *United States v. Seifert*, 648 F.2d  
 19 557, 563 (9th Cir. 1980)); *see also United States v. Mayo*, 646 F.2d 369, 374 (9th Cir. 1981). The  
 20 district court then must consider “the weight and credibility of the proposed testimony and the  
 21 economy of severance.” *United States v. Castro*, 887 F.2d 988, 998 (9th Cir. 1989). It is  
 22 insufficient to state that a co-defendant “likely” would offer exculpatory testimony at a separate  
 23 trial. *Id.* Additionally, it is well settled that “a defendant has no absolute right to elicit testimony  
 24 from any witness, co-defendant or not, whom he may desire.” *Gay*, 567 F.2d at 919; *United States*  
 25 *v. Roberts*, 503 F.2d 598, 600 (9th Cir. 1974). Any witness may invoke his Fifth Amendment  
 26 privilege against self-incrimination and refuse to testify. *Gay*, 567 F.2d at 919.

27     ///

28     ///

## **F. Severance for Judicial Economy**

2 A number of circuit courts of appeal, including the Ninth Circuit, have recognized that the  
3 district court has broad discretion to organize the size of its cases in the interest of judicial economy  
4 and case management. *See, e.g., United States v. Kennedy*, 564 F.2d 1329, 1334 (9th Cir. 1997);  
5 *United States v. Casamento*, 887 F.2d 1141, 1151–53 (2nd Cir. 1989); *United States v. Moya-*  
6 *Gomez*, 860 F.2d 706, 754 (7th Cir. 1988). Many district courts have recognized the court’s  
7 inherent authority to manage its case load and to sever in the interest of efficient administration of  
8 justice and judicial economy. *See, e.g., United States v. Mancuso*, 130 F.R.D. 128 (D. Nev. 1990);  
9 *United States v. Gallo*, 668 F. Supp. 736, 754–58 (E.D.N.Y. 1987), *aff’d* 863 F.2d 185 (2nd Cir.  
10 1988), *cert. denied*, 489 U.S. 1083 (1989).

11        In *Mancuso*, 130 F.R.D. 128, Judge Reed recognized the general rule that defendants  
12 jointly indicted should ordinarily be tried together, and that co-conspirators in a conspiracy case  
13 should ordinarily be tried together. *Id.* at 130–31. However, his decision thoughtfully reviewed  
14 and considered the difficulties of a joint trial in a complex multi-defendant case. The decision  
15 pointed out that a complex multi-defendant case is “fraught with problems.” *Id.* at 131. He  
16 recognized that a single trial of a complex multi-defendant case imposes enormous burdens on the  
17 defendants, defense counsel, prosecutors, jurors, the court, and the judge. *Id.* Dozens of people  
18 are required to be in court every day. *Id.* Therefore, the absence of any one person may bring the  
19 entire trial to a screeching halt. *Id.* Complex multi-defendant cases involve reconciling the  
20 individual calendars of the prosecutors and each defense attorney with the court’s docket. *Id.*  
21 Attorneys carrying a full case load have conflicts with other trials, and the longer the case lingers,  
22 the more pronounced these conflicts become. *Id.* Judge Reed noted that a lengthy trial of multiple  
23 defendants creates a unique hardship on each party involved. Jurors spend months away from their  
24 daily lives, defendants are required to endure months of pretrial incarceration before their case is  
25 finally adjudicated, and often significant amounts of time-consuming evidence are presented  
26 which are unrelated to a particular defendant. *Id.* Attorneys are unable to spend significant time  
27 on their remaining cases. *Id.* The court is forced to expend an exorbitant amount of time on a

1 single case, and other litigants must “queue up for the remaining courtrooms.” *Id.* The result is a  
2 strain on the court’s docket and unconscionable delays of all other cases. *Id.*

3 *Mancuso* also recognized the personal strain on the trial judge in a long complex case. The  
4 trial court is required to make rulings as issues come up which often require frequent adjournments  
5 necessitated by unavoidable problems associated with multiple jurors, multiple defendants, and  
6 their counsel as well as the witnesses and courtroom personnel who are required to be present at  
7 all times. *Id.*

8 **II. Analysis & Decision**

9 The court’s case management order set an early deadline for filing motions to sever  
10 because, at the case management conference conducted on April 22, 2016, counsel for Dave Bundy  
11 stated he would be filing a motion to sever on behalf of his client. An early deadline was set so  
12 that the court could evaluate if there was some consensus among the defendants concerning  
13 severance. There was not. In their motions to sever, the defendants argued that the deadline for  
14 filing motions to sever was premature because voluminous discovery had been produced by the  
15 government shortly before the deadline for filing the motions. Virtually all of the defendants’  
16 motions to sever indicated they needed time to review the discovery to provide more specific  
17 support for their request to sever. Almost all of the defendants asked for leave to supplement their  
18 motions to sever after an adequate time to review discovery. As a result, the court held off deciding  
19 the motions to sever the defendants filed.

20 On November 13, 2016, the government filed what it called a “supplement” to its responses  
21 to defendants’ motions to sever, and its own motion to sever the defendants into three tiers for  
22 trial. *See* ECF No. 971. The government’s supplement and motion to sever was filed shortly after  
23 the acquittal of the defendants who were also charged in the Oregon prosecution. It is clear to the  
24 court this is no coincidence. Clearly, the government expected a different result. Clearly, the  
25 government believed that a different outcome of some or all of the Oregon defendants’ case would  
26 prompt non-trial dispositions in this case. The government’s motion was not timely filed. Payne  
27 and counsel for other co-defendants correctly point out that the case management order required  
28 the government to comply with the same deadline for filing motions to sever as the defendants.

1 However, virtually all of the defendants stated they were unable to support their motions to sever  
2 by the initial deadline because they had not had an adequate opportunity to review the discovery.  
3 Virtually all of the defendants asked for leave to supplement their motions to sever after reviewing  
4 the government's voluminous discovery. All of the defendants have now had more than six months  
5 to review discovery in this case, yet none of the defendants have supplemented their motions with  
6 any specific support for severance based on *Bruton* concerns, or antagonistic or mutually exclusive  
7 defenses. None of the defendants have met their burden of establishing that they would call a co-  
8 defendant in a severed trial, that a co-defendant would in fact testify, and that co-defendant's  
9 testimony would be favorable.

10 The defendants are also correct that the government has changed its position regarding  
11 severance. In opposing the defendants' motions to sever, the government argued that all 19  
12 defendants were appropriately joined for trial and had not shown that a joint trial would be  
13 manifestly prejudicial. The government's responses to the various defense motions argued that  
14 this was a conspiracy case, and therefore the paradigm case for a joint trial. The government's  
15 responses also argued that the defendants had not met their burden of establishing that any *Bruton*  
16 issues, mutually exclusive defenses, or antagonistic defenses precluded a joint trial. Similarly, the  
17 government argued that none of the defendants had met their burden of establishing that any co-  
18 defendant would testify in a severed trial. The government now argues that joinder of all of the  
19 defendants was and is still appropriate and has resulted in efficiently getting this case ready for  
20 trial. However, the government now argues that a 17-defendant trial would be too unwieldy. The  
21 government asks that the court sever the trial into three groups in the interests of judicial economy  
22 and efficient case management. The three tiers suggested correspond to what the government  
23 believes the individual defendants' roles in the offenses charged in the indictment were. The three  
24 groups are: Tier 1 – Cliven Bundy, Ryan Bundy, Ammon Bundy, Peter Santilli, and Ryan Payne;  
25 Tier 2 – Dave Bundy, Mel Bundy, Joseph O'Shaughnessy, Brian Cavalier, Jason Woods, and  
26 Micah McGuire; and Tier 3 – Richard Lovelien, Todd Engel, Gregory Burleson, Eric Parker, O.  
27 Scott Drexler, and Steven Stewart.

28

1       The defendants have also changed their positions with respect to severance. The majority  
2 of the defendants filed motions to sever requesting individual trials. Ammon Bundy and Ryan  
3 Bundy argued that all of the Bundy brothers should be tried together. Mel Bundy initially indicated  
4 he was not willing to be tried with his other brothers. Now that the government is seeking a  
5 severance of this case into three separate trials, the majority of the defendants now want a joint  
6 trial. Because the court has already indicated that severance will be ordered, the majority of the  
7 defendants want to be tried first. A number of defendants who had previously asked to be severed  
8 and tried individually now take the position that being tried on February 6, 2017, outweighs their  
9 desire to be severed. Those defendants are Eric Parker, Richard Lovelien, Steven Stewart, Joseph  
10 O'Shaughnessy, Micah McGuire, and Jason Woods. Some of the defendants are amenable to  
11 going to trial with any group of co-defendants as long as they are in the first group set for trial.

12       In light of the court's indication that the trial would be severed, Ammon and Ryan Bundy  
13 requested in their supplements that they be moved to a later group for trial because they have  
14 recently returned from defending themselves in Oregon. Brothers Mel Bundy and Dave Bundy  
15 want to go to trial first.

16       Cliven Bundy initially asked the court to sever his case from the trial of all of his co-  
17 defendants. His response to the government's motion to supplement now states the opposite. He  
18 now seeks a joint trial. His response to the government's proposal argues it is the responsibility  
19 of the court to ensure a venue for a joint trial of all 17 defendants. He asks the court to prove it is  
20 not logically possible to try all 17 defendants in a joint trial. However, if the court is not going  
21 to hold a joint trial, he asks that he be severed and tried last. During oral argument on December  
22 9, 2016, counsel for Bundy stated that he was requesting to go last if any severance was ordered  
23 because he expects the defendants will be acquitted and he did not want his co-defendants and  
24 their families and loved ones to undergo the hardship of waiting for trial.

25       During oral argument on December 9, 2016, counsel for the government argued that the  
26 government's proposal was the most logical, would result in judicial economy, and conserve  
27 resources. The court inquired of counsel for the government why it would be fair to make the  
28 defendants in its proposed Tier 3 wait the longest for trial when these were the individuals the

1 government regarded as least culpable. Counsel for the government responded that the sequence  
2 of the trial suggested would, in counsel's view, be most logical and conserve resources because  
3 trying the Tier 1 leaders and organizers first would give the court an overview of the entire case.  
4 Additionally, trying the Tier 1 defendants first would likely resolve a number of legal issues that  
5 could be applied to the defendants awaiting trial. The court inquired whether it made more sense  
6 to try the Tier 3 defendants first as the evidence in that case would be narrower than the evidence  
7 introduced in the trial of the Tier 1 and Tier 2 defendants. The government responded that it was  
8 not "wed" to the sequence of the trials. However, government counsel believed trying the Tier 1  
9 defendants first would be most efficient and conserve the most resources.

10 The court also inquired whether two trials, rather than three trials, would be more efficient.  
11 The government responded that it would, of course, try the case in the manner in which the court  
12 determined the case should be severed. However, the government believed that a joint trial of the  
13 Tier 1 and Tier 2 defendants would be cumbersome and involve a large number of limiting  
14 instructions that the jury might find confusing.

15 The court will order severance in the interests of judicial economy and efficient case  
16 management. The court finds that three trials in the groupings proposed by the government is the  
17 most logical and will result in the most efficient manner of trying the 17 defendants awaiting trial  
18 in this case. However, the court disagrees with the government that it would be less fair to try the  
19 least culpable defendants first. The court will order that the Tier 3 defendants be tried first. These  
20 are the defendants the government contends are the least culpable of the 3 groups of defendants.  
21 In the absence of any compelling reasons for trying Tier 1 or Tier 2 defendants earlier, it seems  
22 more fair to try the Tier 3 defendants first. The trial of the Tier 3 defendants will likely be a shorter  
23 trial than the trial of either the Tier 1 or Tier 2 defendants. These defendants are primarily involved  
24 with the events on April 12, 2014. They are not alleged to be involved in the broader overall  
25 conspiracy, or events before or after April 12, 2014. Trial of the Tier 3 defendants will focus on  
26 their individual positions and involvement in the events on April 12, 2014. Evidence of the  
27 involvement and actions of those the government alleges are the leaders and organizers of the  
28 conspiracy can be presented in more summary fashion in a trial of the Tier 3 defendants.

## **CONCLUSION**

Having reviewed and considered all of the moving and responsive papers in connection with the severance issue, the court agrees that the most logical, efficient, and manageable way to try this case is to separate the defendants into three groups corresponding to their alleged roles in the offenses charged in the superseding indictment.

**IT IS ORDERED** that:

1. The trial of the 17 defendants awaiting trial shall be severed into three groups for three separate trials consisting of:
  - a. Tier 1: Cliven Bundy, Ryan Bundy, Ammon Bundy, Peter Santilli, and Ryan Payne;
  - b. Tier 2: Dave Bundy, Mel Bundy, Joseph O'Shaughnessy, Brian Cavalier, Jason Woods, and Micah McGuire; and
  - c. Tier 3: Richard Lovelien, Todd Engel, Gregory Burleson, Eric Parker, O. Scott Drexler, and Steven Stewart.
2. The Tier 3 defendants will proceed to trial February 6, 2017.
3. The Tier 1 defendants will proceed to trial 30 days after the conclusion of the trial of the Tier 3 defendants.
4. The Tier 2 defendants will proceed to trial 30 days after the conclusion of the trial of the Tier 1 defendants.
5. All pending severance motions, responses, replies, supplements and joinders are terminated.
6. Any specific request for relief not addressed in this order is denied.

DATED this 12th day of December, 2016.

Peggy A. Jeen  
PEGGY A. JEEN  
UNITED STATES MAGISTRATE JUDGE